No. 79-5184

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

LEONEL LAUREL, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

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MEMORANDUM FOR THE RESPONDENT

Petitioner contends that he was improperly sentenced to a special parole term for conspiring to possess heroin with intent to distribute in violation of 21 U.S.C. 846.

1. On April 24, 1976, pursuant to his plea of guilty, petitioner was convicted in the United States District Court for the Western District of Texas of conspiring to possess heroin, with intent to distribute, in violation of 21 U.S.C. 846. Petitioner was sentenced to fifteen years' imprisonment, to be followed by a fifteen year term of special parole. No direct appeal was taken from the conviction or the sentence.

On February 23, 1979, petitioner filed a motion under Fed.R.Crim.P. 35 to correct his sentence, claiming that imposition of a special parole term was not authorized for the drug conspiracy offense (Pet. App. B). On April 18, 1979, the motion was dismissed as untimely. The court also held that, in any event, reduction of the sentence was unwarranted (Pet. App. C). Thereafter, petitioner filed a notice of appeal, and a motion to proceed in forma pauperis. The district court determined that the appeal was frivolous and interposed merely for delay, and denied the motion to proceed in forma pauperis (Pet. App. D-1 to D-3, E-1). The court of appeals also denied leave to proceed in forma pauperis (Pet. App. H-1).

2. In this petition for a writ of mandamus, petitioner contends that imposition of a special parole term for his conspiracy conviction was not authorized by 21 U.S.C. 846, and, hence, the courts below erred in denying his application for leave to appeal in forma pauperis.

Petitioner's contention that 21 U.S.C. 846 does not authorize the imposition of a special parole term for a conspiracy conviction is the same claim presented by the petitioner in United States v. Bifulco, No. 79-5010, petition for certiorari filed July 31, 1979. We have acquiesced in the petition for certiorari in that case because there is a division among the circuits on that question. For the reasons we have stated at greater length in our response to the petition in Bifulco

(Br. 4-5), 1/ most of the circuits have correctly held that Section 846 does authorize a special parole term for conspiracy convictions. See United States v. Sellers, No. 79-1107 slip op. 11-14 (8th Cir. August 7, 1979); Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Houde, 596 F.2d 696, 701 & n.1 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1358 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir. 1978), cert. denied, No. 78-5226 (October 30, 1978); see also United States v. Dankert, 507 F.2d 190, 191 (5th Cir. 1975). The Third Circuit, however, has held to the contrary in United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979), cert. petition pending, No. 79-415. Because we believe that the conflict warrants this Court's review, this Court should treat the petition as a petition for a writ of certiorari (see Doherty v. United States,

1/ A copy of our response in Bifulco has been sent to petitioner.

404 U.S. 28 (1971)) 2/ and should hold the petition pending its disposition of the petition in Bifulco.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1979

2/ As a procedural matter, a writ of mandamus is not a proper remedy, because that remedy is available only in exceptional circumstances and is not a substitute for appeal or petition for a writ of certiorari. Since petitioner could seek this Court's review of the court of appeals' denial of his motion to proceed in forma pauperis by a petition for a writ of certiorari, the petition for mandamus should be treated as a petition for a writ of certiorari. See Doherty v. United States, supra.

Although the district court denied petitioner's Rule 35 motion on the merits (correctly, we believe), it also denied the motion as untimely, since it was filed more than 120 days after the imposition of the sentence. The latter ground was incorrect because Rule 35 states: "The Court may correct an illegal sentence at any time * * *" and petitioner's contention was that the special parole term was unlawful.